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TO: Owens Wright LLP – lawyers and clients

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RE: Contracts, Indefinite Term, Implied Right to Terminate on Reasonable Notice
Credit Security Insurance Agency Inc. vs. CIBC Mortgages Inc. 2006
CarswellOnt 2441 – Judgement April 25, 2006

This is a well reasoned case decided by Justice Mesbur regarding a contract under which Credit Security had the right to provide CIBC mortgage customers with mortgage insurance. The agreement had specific termination rights – I) by mutual agreement or, II) on 120 days prior notice for material breach with a 30 day cure period.

"The underlying question here is whether contracts without a termination clause, or with a limited one, can, or should be, presumed to be perpetual, or whether a term permitting unilateral termination on reasonable notice should be implied."

Early case law stated that contracts without termination clauses are presumed to be perpetual except in limited circumstances such as master servant contracts where elements of trust and confidence prevailed. A later line of cases suggests that there is a presumption against perpetuity that may be expressly displaced. In other words, the exception became the rule.

Justice Mesbur decided that she would not presume in favour of or against perpetuity and asked herself: "what sort of contract did the parties negotiate here?"

She found:

1. it was a commercial services contract;
2. its hallmark was not the kind of "trust or confidence" that would "naturally" give rise to the implied right to terminate;
3. there were termination provisions;
4. there were cure provisions that suggest a long term contract; and
5. one must look at the circumstances at the time the contract was formed to determine the parties' intentions, not at the time one of them wants to terminate.

She concluded that to give one party a right to terminate beyond the two specified rights to terminate as expressed in the contract, would give that party a much broader right to terminate than contemplated by the agreement and therefore contradicts the express terms of the written contract. She could find no compelling reason to interfere with the clearly expressed intention. She could find no commercial necessity to imply a provision permitting unilateral termination on reasonable notice. She also concluded that if there was an implied duty on Credit Security to negotiate in good faith the conditions of termination, it had not failed to do so just because an agreement was not reached.

"In the face of an agreement with a specific contractual right regarding termination for fundamental breach, which included a time to cure, it would be ironic indeed to imply a term that would give a party fewer rights without any breach occurring at all. Simply put, how can it be said that a party has an obligation to bargain away the very right it bargained for, and if agreement is not reached, the other party may simply terminate."

CONCLUSION

1. Unless you are sure you want the contract to continue make sure you have termination provisions that are satisfactory to you at the time you sign the contract.
2. If the contract has limited termination provisions, there is little likelihood that an implied right to terminate on reasonable notice will be found to exist unless the court is satisfied that the contract is one where the hallmark is "trust and confidence" which suggests a commercial necessity to imply a unilateral right to terminate.
3. If the contract has no termination provisions whatsoever, there is a stronger possibility of an implied termination provision being found to exist than if there are limited provisions as there is nothing in the contract that would contradict such an implied term.